No. 14365

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. J. EARHART,

Appellant

vs.

ALFRED J. CALLAHAN, Jr.,
Trustee in Bankruptcy of the Estate
of Felix Ivan Pugh, Bankrupt,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR RE-HEARING

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Appellant respectfully petitions this honorable court for a reconsideration of its decision filed on March 10, 1955 on the subject of *bailment* because we believe that the conclusion arrived at by this hon-

orable court is at variance with the statutory law of the State of Washington and the subject of bailment as annunciated by the decisions of the Supreme Court of the State of Washington.

More than twenty years ago the Washington State Legislature adopted the Uniform Sales Act (Rem. Rev. Stat. Sec. 5836, et seq., now R.C.W. 63.04 et seq.).

In state court receivership proceedings in the case of *Dahl v. Stromberg*, 31 Wn. 2d 884 it appears that one Bennett was the owner of certain real property consisting of a garage immediately in front of his home in Falls City, Washington which he orally leased to a man named Stromberg. Bennett agreed to sell and Stromberg agreed to buy the stock of tools and equipment then on the premises for $1750.

Later on a man named Dahl entered into a business association with Stromberg. The association proved unsatisfactory and Dahl brought receivership proceedings and one Charles Evans was appointed receiver. Bennett intervened in the receivership and claimed the tools and equipment as his own.

The trial court was called upon to decide the issue of the right to possession as between Bennett and the receiver under state law. The trial court decided that Bennett was a bailor and Stromberg a bailee and as against the receiver that Bennett was the owner

and entitled to possession as against the receiver. In affirming the judgment of the trial court, the Supreme Court of the State of Washington said (p. 886):

> "We agree with the trial court that Bennett and Stromberg could and did abandon their conditional sales agreement.
>
> That was accomplished before Dahl had any dealings with Stromberg. Had there been a redelivery of possession by Stromberg to Bennett at the time of the abandonment of the conditional sales contract and then a return of the tools and equipment by Bennett to Stromberg for his use in the operation of the garage, there could be no question that Stromberg was the bailee thereof and would have no interest therein which he could transfer to Dahl.
>
> Appellant contends that because Stromberg retained the physical possession which he had originally assumed under the conditional sales contract, Rem. Rev. Stat. (Sup.) §3790 applies. With this we cannot agree. The fact that there was no physical transfer of possession by Stromberg to Bennett and by Bennett to Stromberg can avail the appellant nothing. The fact still is that Stromberg was in possession of Bennett's property *as bailee*, and Dahl was not deceived by the abandoned conditional sales contract, because he knew nothing about it.
>
> Rem. Rev. Stat. (Sup.) §3790, the statute relied on reads, 'That all conditional sales * * * shall be absolute as to all subsequent *bona fide* purchasers * * *'
>
> *It is not the right to possession that becomes absolute when the conditional sales contract is not filed for record; it is the conditional sale that becomes absolute.* In the present case there was

no conditional sale that could become absolute when Stromberg purported to sell to Dahl an interest in the tools and equipment, because that conditional sale had been abandoned more than three months earlier.

Appellant next urges that the bill of sale used to evidence the abandonment of the conditional sales contract made Stromberg the seller and brings this case within the Sales Act, Rem. Rev. Stat. §5836-25 (P.P.C. §859-17) which reads as follows: (here the statute is set out)

The section of the statute relied upon applies 'where a person having sold goods continues in possession of the goods * * *' Stromberg was not a person 'having sold goods' because he had no goods to sell. He never had more than a fifty dollar interest in goods worth, presumably seventeen hundred fifty dollars, under a conditional sales contract, the abandonment of which was evidenced by the bill of sale. Such a bill of sale cannot create a title or interest which the seller does not have. The document in question adds nothing to or subtracts nothing from the rights acquired by Dahl when Stromberg purported to sell him an interest in the tools and equipment."

In the case at bar, the evidence clearly shows that the minds of the parties (the bankrupt and Earhart) never met on any part of an agreement other than that the hay would be and was stored in the barn on the property leased by Earhart to the bankrupt. It was, however, agreed that *when the feeding season commenced* — which was anticipated would be in October 1953 — that *Pugh might consummate a purchase, by paying Earhart by the month.*

The feeding season had not yet arrived when the bankrupt filed his petition, and before a trustee was appointed the bankrupt in writing stated Earhart owned the hay.

While the bankrupt testified that the contemplated purchase was to be at the rate of $200 a month, *as he recalled* Earhart *was positive in his testimony* as shown by the record, pp. 39, that no sale had been consummated.

Q. When did you first have a conversation with Mr. Pugh about the 1953-1954 hay — the hay he needed for 1953-1954 to throw into the cattle?

A. I think it was prior to July 10, 1953.

Q. What was that first conversation with Mr. Pugh?

A. Pugh had refinanced through the Farmers' Credit Association, refinanced, and he had paid up various debts. He paid me off what he owed on the cattle, and he paid the Washington Co-operative Farmers' Association — he owed them $500 — and he paid that off, and I think there were a few other small debts he paid off but *he still owed me,* and he owed me something for rent, and the bank had refused to take his checks any more for the rent. They told me they couldn't handle it any more, because they were NSF checks, and so he wanted me to — and we handled it by making a note for the back rent *and hay — he hadn't paid for all of the previous year's hay and we put it in a note amounting to*

$714.00 and then he wanted me to finance him for this hay, and I (R. 40) said "Yes, Ivan, I will, but *it will be put on a different basis.*"

Q. That was for this hay we are talking about here?

A. Yes sir, I said, "We will do it on a different basis." I said "I will buy it and pay for it, and I will sell it to you on a thirty-day basis."

Q. As he used it? A. Yes.

And at p. 44, regarding his payment for the hay:

Q. Did you make it clear in that letter or order to Mr. Walters that your purchase was *a new transaction,* separate from the bankrupt's original order for 60 tons of hay?

A. Yes, sir. I told him I was buying the hay, yes.

Q. Did you have any specific agreement with Mr. Pugh as to how he was to pay for this hay on a monthly basis?

A. Not yet.

Q. That was held in abeyance *until he began to feed it?*

A. Yes, he didn't feed until October, and this came up in the meantime.

Q. And you had an understanding with him you would reach an agreement later on that point, whether he would take his milk checks and turn them over to you?

A. Yes, sir. I always thought we would figure up so many bales a month, you know. That was the way we would do it.

It has been held by the 8th Circuit in the case of *Gillespi v Piles & Co.*, 178 F. 886 that property which was purchased by an insolvent, subsequently bankrupt, *with knowledge that he could not pay for it forms no part of the estate in bankruptcy* where the sale has been rescinded by the original vendors and demand made for the proceeds. The proceeds of the property may therefore be recovered by the vendor from the purchaser's trustee in bankruptcy.

See also *Thomas v. Taggart*, 209 U.S. 385.

In 6 Am. Jur. Bailments, Sec. 36, p. 163, we find:

> "It is a common practice to leave personal property with another as bailee, who is to have the right of purchasing it if he pleases. *Such a transaction is a bailment with the privilege or option of purchase*, although it is often confounded with a sale, either conditional or under a contract of 'sale and return'."

Strom v. Baker, 150 U.S. 312.

> In support of this rule it is said of this rule that such a transaction includes two distinct but consistent contracts, the one taking effect, if at all, when the other is spent. The bailment is operative to fulfill its proper function, and it is subverted by the happening of the event which brings about a sale; both are consistent and may stand together as part of the same contract relation."

Hamilton v. Billington, 163 Pa. 76, 29 A. 904, 43 Am. St. Rep. 780.

In the opinion filed herein (page 2) it is said:

> "In the year 1952 Earhart financed Pugh, and in 1953 Pugh, *expecting that Earhart would finance his purchase of hay again*, went to Sunnyside, Washington, during the summer of 1953 and *bought the hay in question* from Mr. W. C. Walters; the price of the hay was $1200.00 and *Pugh testified* that at the time he gave Walters a check for $1200.000 and that *he received a bill of sale from Walters for the hay.*"

Granted that he so testified — he also testified that his check for $1200.00 dated in July or August, 1953 was returned by Pugh's bank marked NSF (R. 28) and that he knew he did not have on deposit funds sufficient to have the check honored.

The so-called bill of sale was never produced and there is no evidence that it was ever recorded as required by the laws of the State of Washington.[1]

The testimony of Pugh is entitled to little or no credence for the following reasons:

1. He lied when he said he paid for the hauling of the hay. (R. 30).
2. He lied when he said that Walters gave him a bill of sale to the hay (R. 23). All he got was a receipt for his check (R. 28).
3. He lied when he first said Earhart came to his house to have him sign Ex. 1 dated October 16, 1953; and *wouldn't leave until that was*

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[1] §5291 Rem. Rev. Stat.

signed (R. 33). Because he signed it a day or two later after he and Earhart went to his lawyer's office. (R. 36).

BAILMENT

3 R.C.L.—(Bailments) §7, p. 77.

"*Privilege of purchase and bailment for sale*—It is common practice to leave personal property with another as bailee, who is to have the right of purchasing it if he pleases. Such a transaction is a bailment with the privilege or option of purchase, and is often confounded with a conditional sale. Where from the contract it appears that the party who receives possession of goods receives them under an agreement that he is to retain them for a definite period, and that if at or before the expiration of that period, he pays for them, he is to become the owner, otherwise to pay for their use, the transaction is but a bailment, and title to the property, even against creditors, remains in the bailor until the price is paid."

Dunlap v. Gleason, 16 Mich. 158, 93 Am. Dec. 231;

Brown v. Billington, 163 Pa. St. 76, 29 Atl. 904, 43 A.S.R. 780;

Lippincott v. Scott, 198 Pa. St. 283, 47 Atl. 1115, 82 A.S.R. 801 and note.

In bankruptcy the construction and validity of a contract must be determined by local laws of the State.

Bryant v. Swafford 214 U.S. 279.

"An express contract is not necessary to constitute a bailment, many well recognized cases of bail-

ment being founded on an implied contract."

6—C. J. Bailments §30 p. 1105.

"An oral bailment is as valid as one that is written, and is entitled to the same consideration."

6—C. J. 1 Sec. 29, p. 116 Bailments.

"A stipulation for a return of the property bailed *is unnecessary to constitute a bailment*, at least if the bailor has a right to re-take the goods.

6—C. J. Bailment §3 p. 1086.

Walton v. Tepel 210 Fed. 261;
In re Angeny 151 Fed. 959.

That Pugh did not consider that he owned this 54 tons of hay when he filed his petition in bankruptcy is further evidenced by the fact that *he did not list it in his schedule of assets.*

In his schedule of debts he lists as being due Earhart $850 — (undisputed) on promissory note $350 for taxes, 1952-53, and on open account for hay (1953) $1540.

Pugh was adjudicated bankrupt October 14, 1954 (R. 21) just two weeks after the last load of hay was delivered. (R. 52).

October 16, 1953, which was long before a trustee was appointed (November 17, 1953) he signed a

statement that Earhart owned the 54 tons of hay (Ex. 1), and later a similar statement to Farmer's Home Loan Association (Ex. 2 R. 64).

The trustee made no inventory of the assets of the bankrupt estate as required by the Bankruptcy Act.

There were absolutely no assets in the bankrupt estate and this summary proceeding was commenced for the sole purpose of securing funds to pay the trustee, his attorney and the attorney for the bankrupt, and actually deprives Earhart of his property without legal or equitable justification.

The court in its opinion says: (p. 2) that Pugh "bought the hay in question from Mr. Harry C. Walters; the price of the hay was $1200.000 and Pugh testified that at that time he gave Walters a check for $1200 and *received a bill of sale from Walters for the hay,*" and further "Pugh testified *he gave to Earhart* the bill of sale he had received *from Walters.*"

The record we believe clearly shows that all Pugh received from Walters was a receipt for his check (R. 28). He did positively testify however that:

"The check was returned NSF * * *" (R. 28).

"Property which was purchased by an insolvent, subsequently bankrupt, with knowledge that he could not pay for it forms no part of the estate in bankruptcy where the sale has been re-

> scinded by the original vendors and demand made for the proceeds. The proceeds of the property may therefore be recovered by the vendor from the purchaser's trustees in bankruptcy."

Gillespi v. J. C. Piles & Co. (C.C.A. 8) 178 F. 886; *Thompson v. Taggart* 209 U.S. 385.

At p. 7 of our brief we pointed out that in February 1954 one Tibeau entered into a stipulation with the trustee and Earhart, by the terms of which Tibeau purchased this hay for $30 a ton and agreed to pay the trustee therefor as used by him and as between the trustee and Earhart it was agreed that all sums received by the trustee from Tibeau would be kept in a separate account to await the outcome and final determination as to the title of this hay.

The trustee in bankruptcy stands in no better position than the bankrupt.

It is therefore respectfully requested that further consideration be given the matter by this honorable court.

Respectfully submitted,

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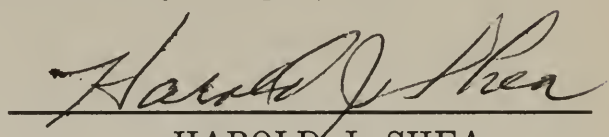
CERTIFICATE

I hereby certify that in my professional judgment this petition for reconsideration or re-hearing is well founded and it is not interposed for delay but solely in an attempt to prevent a miscarriage of justice.

Dated this 5th day of April, 1955.



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